STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 25, 2010
v	No. 287477 Wayne Circuit Court
EDWARDO JOIEL HINTON, Defendant-Appellant.	LC No. 08-005022-FC

Before: METER, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of armed robbery, MCL 750.529; two counts of assault with intent to murder, MCL 750.83; assault with intent to maim, MCL 750.86; first-degree home invasion, MCL 750.110a(2); two counts of assault with a dangerous weapon (felonious assault), MCL 750.82; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent prison terms of 15 to 25 years' imprisonment for the armed robbery convictions, 15 to 25 years' imprisonment for the assault with intent to murder convictions, five to ten years' imprisonment for assault with intent to maim, 5 to 20 years' imprisonment for first-degree home invasion, two to four years' imprisonment for the felonious assault convictions, and two to five years' imprisonment for felon in possession of a firearm. All nine sentences are to run consecutively to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the prosecutor presented insufficient evidence to support the trial court's verdict. We review a challenge to the sufficiency of the evidence in a bench trial de novo. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). The evidence is viewed in the light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to establish the elements of a crime." *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

Defendant initially contends that there was insufficient evidence to identify him as a perpetrator of the crime. Identity is always an essential element of any crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). We find that there was sufficient evidence to identify defendant as one of the perpetrators. Most of the evidence came from the victims' testimony; however, the testimony of a victim alone is sufficient evidence to establish a

defendant's guilt beyond a reasonable doubt. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990). All of the victims identified defendant as one of the two armed men who entered the residence of Mozelle and Clarence Jones. Mozelle, Diana Joslin, Carol Joslin, and Corliss Tolbert all testified that defendant entered the house and demanded money from Mozelle, and that he began to hit her in the face with a gun. Moreover, defendant was arrested shortly after the incident in a nearby vacant house. At the time of his arrest, defendant was in possession of a handgun and was wearing body armor. The evidence was sufficient to identify defendant as one of the perpetrators.[1]

Defendant next argues that there was insufficient evidence of intent to support his convictions for two counts of assault with intent to murder and a count of assault with intent to maim. To secure a conviction of assault with intent to murder, the prosecutor must prove the following three elements: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Assault with intent to maim requires that the defendant (1) assaulted another person, (2) "with intent to maim or disfigure his person by cutting out or maiming the tongue, putting out or destroying an eye, cutting or tearing off an ear, cutting or slitting or mutilating the nose or lips or cutting off or disabling a limb, organ or member." MCL 750.86; *People v Ward*, 211 Mich App 489, 490-491; 536 NW2d 270 (1995).

Regarding the assault with intent to murder, there was sufficient evidence that defendant aided and abetted his unnamed codefendant in assaulting Clarence with the intent to murder and that he himself assaulted Mozelle with the intent to murder.

To support a finding that a defendant aided and abetted a crime, the prosecutor must show that:

> (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (internal citations and quotation marks omitted).]

For a valid conviction, an "aiding and abetting" criminal defendant "must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense." *Id*. at 15. The record establishes that the unnamed codefendant took four dollars from Clarence, and then the unnamed codefendant stepped back and shot four times at Clarence, hitting him in the right foot and left arm. The usual purpose of intentionally discharging a firearm at someone within close range is to cause a death. *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974). It is also

[1] Defendant argues against the reliability of the photographic lineup that was conducted. However, he does not raise the issue of the lineup in his statement of questions presented for appeal and has therefore waived the issue. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Moreover, we note that defense counsel affirmatively allowed the photographic array to be admitted into evidence.

clear from the record that defendant and the unnamed codefendant had a close association during the criminal transaction, and from that evidence it is reasonable to infer that they were assisting each other in the commission of the crime. Both men arrived at the Jones's residence at the same time, they split up, and each confronted one of the owners and demanded "the money" and threatened those who were present with handguns. After they found the money, the men left the house and fled together. Additionally, there was evidence from which one could infer that defendant was aware of the unnamed codefendant's intent to kill Clarence because he had the same intent; he acted at the same time in a similar, planned manner. While the unnamed codefendant was assaulting Clarence, defendant pointed his handgun at Mozelle's head and said, "If you don't give me the money, I'll blow your damn brains out." After Mozelle refused to give defendant any money, defendant attempted to fire the gun, but it only "clicked." The codefendant similarly demanded money from Clarence and shot at him. Moreover, after the shooting, both men remained in the house until they found the money and fled together. From this evidence, a rational trier of fact could draw the reasonable inference that defendant had knowledge of the unnamed codefendant's intent at the time he gave aid and encouragement, and that he himself had the intent to kill. Thus, we find that there was sufficient evidence to support defendant's conviction for aiding and abetting the assault with intent to murder Clarence.

The evidence was also sufficient to support a finding that defendant assaulted Mozelle with the intent to murder because he entered the house, demanded money, and unsuccessfully attempted to fire a gun at Mozelle's head. Although the gun did not fire, defendant's actions were sufficient to find that he assaulted Mozelle with the intent to murder. See *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

Regarding the conviction of assault with intent to maim, the facts support that after defendant pulled the trigger on the gun, Mozelle tried to push defendant away, and defendant then began to hit her repeatedly in the eye and the head with the handgun. The injury to Mozelle's eye caused a loss of eyesight. Intent to maim includes "putting out or destroying an eye." MCL 750.86. Here, the fact that defendant repeatedly stuck Mozelle's eye with a handgun permits the inference that he assaulted her with the intent to maim after he unsuccessfully assaulted her with the gun.

Defendant also argues that there was insufficient evidence connecting defendant to the gun. To sustain a conviction for felon in possession of a firearm, the prosecutor must prove: (1) the defendant possessed a firearm, (2) the defendant was previously convicted of a felony, and (3) less than five years elapsed since the defendant completed probation and satisfied certain other requirements. MCL 750.224f; *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004). "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); see also MCL 750.227b. In this case, the only element in dispute is possession. We find that there was sufficient evidence to support defendant's convictions for felon in possession of a firearm and felony-firearm. As discussed above, there was eyewitness testimony that defendant was in possession of a handgun when he entered the Jones's house and used the handgun to commit a robbery.

Defendant next argues that his convictions for both assault with intent to murder and assault with intent to maim violated his constitutional right to be free from double jeopardy. As we recently explained in *People v McGee*, 280 Mich App 680, 682-683; 761 NW2d 743 (2008):

> Both the United States and the Michigan constitutions protect a defendant from being placed twice in jeopardy, or subject to multiple punishments, for the same offense. Judicial examination of the scope of double jeopardy protection under both constitutions is confined to a determination of legislative intent. And the validity of multiple punishments under the Michigan Constitution is determined under the federal *Blockburger*[2] "same elements" standard. If the Legislature clearly intended to impose multiple punishments, the imposition of multiple sentences is permissible regardless of whether the offenses have the same elements, but if the Legislature has not clearly expressed its intent, multiple offenses may be punished if each offense has an element that the other does not. In other words, the test emphasizes the elements of the two crimes. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes[.] [Internal citations and quotation marks omitted.]

Assault with intent to murder and assault with intent to maim each require proof of a fact that the other does not. A reading of the plain text of the statute reveals that to prove assault with intent to murder, the prosecution was required to prove that defendant assaulted the victim with the intent to commit the crime of murder. MCL 750.83. This element is not required to prove assault with intent to maim. Additionally, to prove assault with intent to maim, the prosecution must prove that defendant assaulted the victim with the intent to maim one of the enumerated body parts. MCL 750.86. This element is not required to prove assault with intent to murder. "While there may indeed be substantial overlap between the proofs offered by the prosecution to establish the crimes, the prosecution must nevertheless prove different elements under these statutory provisions." *McGee*, *supra* at 685. Moreover, the assaults for which defendant was convicted were two distinct acts. Where the defendant commits two distinct acts during the same episode of criminal behavior, the Double Jeopardy Clause does not prohibit multiple punishments for the separate acts. *People v Lugo*, 214 Mich App 699, 708-709; 542 NW2d 921 (1995). The assault with intent to murder was completed when defendant committed the distinct act of pulling the trigger on the handgun. Subsequently, after a brief struggle, defendant began to strike Mozelle in the eye with the handgun, committing the separate act of assault with intent to maim. We find that there was no double jeopardy violation resulting from the two convictions related to defendant's attack on Mozelle.

Defendant next argues that the trial court erred in failing to grant a new trial because the verdict was against the great weight of the evidence and there was newly discovered evidence. To determine whether a verdict is against the great weight of the evidence, we must determine whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 642-644; 576 NW2d 129 (1998). Where a challenge to the great weight of the evidence follows a bench trial, we examine the trial court's findings for clear error, giving regard to the court's special opportunity to judge the credibility of witnesses. MCR 2.613(C). Thus, absent exceptional circumstances,

[2] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 2d 306 (1932).

the issue of credibility should be left for the trier of fact. *Lemmon*, *supra* at 642-643. For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that:

> (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (internal citation and quotation marks omitted).]

Defendant has failed to show that the evidence preponderates heavily against the verdict or that the prosecution witnesses' testimony was impeached to the extent that it was deprived of all probative value and the trial could not believe it. *Lemmon*, *supra* at 642-644. Defendant raises several concerns regarding the photographic array from which the witnesses initially identified defendant; however, even assuming that this issue had been properly presented for appeal,[3] we find that defendant has failed to establish that the lineup was unduly suggestive or otherwise improper and rendered the eyewitnesses' identifications devoid of all probative value. We find, after reviewing the record, including the witnesses' identifications of defendant, that the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.

In addition, the new evidence presented by defendant consists of his own affidavit concerning an alleged statement made by Kevin Pettway telling defendant that he was at the victims' house before the incident occurred and overheard someone in a financial dispute with the victims. This person threatened to have someone "get their money back." This statement constitutes hearsay because it is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). As hearsay, this new evidence is an inappropriate ground for a new trial. See *People v Miller*, 141 Mich App 637, 642-643; 367 NW2d 892 (1985). Thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello

[3] See footnote 1, *supra*.